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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	CS Docket No. 96-133

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COMMENTS OF RESIDENTIAL COMMUNICATIONS NETWORK, INC.

Residential Communications Network, Inc. ("RCN"), by its attorneys, hereby submits these Comments in response to the Commission's Notice of Inquiry ("*Notice*") in the above-referenced proceeding. The *Notice* seeks information on: (i) the current state of competition in the video marketplace; and (ii) the effect of the Telecommunications Act of 1996 ("1996 Act") on competition among multichannel video programming distributors ("MVPDs").

In the two previous reports that the Commission has issued to Congress pursuant to similar Notices of Inquiry, the Commission found that there was no meaningful competition in the video marketplace.[1] Little has changed over the past year. Effective and meaningful competition does not yet exist and many incumbent cable operators continue to impede the efforts of potential competitors to enter the marketplace. In addition, while the Commission has taken an important pro-competitive step in its adoption of rules implementing the new "open video system" ("OVS")

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[1] See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, CS Docket No. 94-48, 9 FCC Rcd 7442 (1994); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, 11 FCC Rcd 2060 (1996).

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configuration, no OVS systems have had time to develop. Therefore, it is still too early to know how much of an effect OVS systems will have on the status of competition. Indeed, as discussed below, the new OVS rules and other changes enacted in the 1996 Act are only a first step toward creation of a regulatory structure which will permit competition to develop -- important program access, inside wiring, and pricing issues remain to be resolved before effective, meaningful competition in the video marketplace will emerge.

I. **Background**.

Through its operating subsidiaries, RCN currently offers competitive video services in the Boston and New York markets. In Boston, RCN distributes such services on a "video dialtone" platform offered by MFS Communications Company, Inc. In New York, RCN recently purchased the subscriber base and certain other assets of Bartholdi Cable Company, Inc. ("Bartholdi"), formerly Liberty Cable Company, Inc. ("Liberty").[2/] At the present time, RCN's New

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[2/] One of the assets purchased by RCN's subsidiary, Freedom New York, L.L.C., is the name "Liberty." Because RCN will refer to Comments filed with the Commission by Bartholdi prior to the acquisition, RCN will refer to Bartholdi herein as "Bartholdi/Liberty." Bartholdi/Liberty filed Comments and Reply Comments with the Commission in 1994 and 1995 in response to the Commission's Notices of Inquiry on the status of competition in the video marketplace. See Comments of Liberty, CS Docket No. 94-48 (filed June 29, 1994); Reply Comments of Liberty, CS Docket No. 94-48 (filed July 29, 1994); Comments of Liberty, CS Docket No. 95-61 (filed June 30, 1995); Reply Comments of Liberty, CS Docket No. 95-61 (filed July 28, 1995) (collectively "1994 and 1995 Comments"). In the 1994 and 1995 Comments, Bartholdi/Liberty described various anticompetitive acts committed by the incumbent cable operator with whom it competes that impeded Bartholdi/Liberty's ability to compete successfully.

York video service primarily uses 18 GHz frequencies for the distribution of video programming. RCN provides video service to approximately 26,500 subscribers in approximately 200 residential and commercial buildings in Manhattan, Queens, The Bronx and New Jersey, a majority of whom live in multiple dwelling units ("MDUs") such as cooperatives, condominiums and rental apartment buildings, as well as several hotels. RCN's Boston services are still very much in the start up phase, largely due to the denial of important local sports and other programming by an affiliate of its incumbent cable television competitor.

II. RCN's Perspective on the Current Status of Competition in the Video Marketplace.

Competition in the video marketplace is in the very early stages of development. Although potential competitors to cable may exist,[3] RCN believes that it will be difficult for these emerging MVPDs to compete effectively against the incumbent cable operators. Based on RCN's recent experience, there are at least three reasons why, absent additional actions by the Commission, MVPDs like RCN have been, and will continue to be, unable to compete effectively: (1) RCN has been denied access to certain popular local sports and other important programming controlled by a vertically integrated competing cable franchise holder; (2) RCN and other new competitors

[3] For example, PacTel, Bell Atlantic and NYNEX plan to begin providing wireless cable service in competition with existing cable operators within the next year. See Brad Smith, *PacTel Sees Video's Future as Wireless*, Broadcasting & Cable, July 8, 1996, at 36; Michael Katz, *BA, NYNEX Moving to Digital Wireless*, Broadcasting & Cable, July 8, 1996, at 38.

have had difficulty gaining access to subscribers because of certain cable inside wiring rules; and (3) the incumbent cable operators have engaged in anticompetitive pricing practices by offering substantial discounts only to certain MDU residents who either are negotiating with RCN or have recently subscribed to RCN's video services

A. Program Access

Congress adopted program access provisions that prohibit any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor from engaging in:

> unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite programming to subscribers or consumers.[4/]

Despite this prohibition, vertically integrated cable operators discriminatorily deny competing MVPDs access to popular programming. Over three years ago, Bartholdi/Liberty filed a complaint with the Commission after being denied access to *Court TV* because of the incumbent cable operator's exclusive contract for the programming.[5/] In a decision issued in 1994, the Commission found:

[4/] 47 U.S.C. § 548(b) (1995).

[5/] The incumbent cable operator in Bartholdi/Liberty's service area owned a significant share of *Court TV*. Therefore, the cable operator's exclusive contract for this program was in violation of the program access rules contained in 47 U.S.C. § 548(b) (1995).

> In this situation allowing exclusivity for *Court TV*, at best, would appear to simply maintain the non-competitive status quo in Manhattan. Thus, we believe that the proposed exclusivity will limit Liberty's ability to develop as an effective competitor, and will also limit the ability of other potential competitors to enter this market. ... We believe that denial of access to popular programming like *Court TV* inhibits Liberty's ability to develop, and thus restrains competition in this particular local market.[6]

While that decision, and the programming access provisions of the Commission's recent OVS Order[7] remove some of the satellite-delivered program access vehicles through which incumbent cable operators may erect barriers to competition, the delivery of programming by cable operators via cable as opposed to satellite is equally vulnerable to competitive abuse.[8] Indeed, to circumvent the rules, a programming affiliate need only "take down" programming from satellite to other delivery channels. Accordingly, in order to prevent further abuses, the precedent established by the Commission in the *Court TV* decision should be expanded to include all programming regardless of how it is distributed.

The Commission has been empowered by the 1996 Act to **take** appropriate action to ensure that all programming, **regardless of** ownership or method of distribution, is accessible to all competi-

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[6] In the Matter of Time Warner Cable Petition for Public Interest Determination under 47 U.S.C. § 76.1002(c)(4) Relating to Exclusive Distribution of Courtroom Television, Memorandum Opinion and Order, CSR-4231-P, released June 1, 1994 at ¶ 37 (footnotes omitted).

[7] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems, Second Report and Order, CS Docket No. 96-46, released June 3, 1996 ("OVS Order").

[8] See, e.g., Comments of Liberty, CS Docket 94-48, pp. 12-14 (filed June 29, 1994).

tors. As the Commission correctly recognized in its OVS Order with respect to satellite programming, the denial of programming is critically detrimental to the emergence of competition given the importance of programming to a consumer's decision as to whether to subscribe to a new service.[9] Indeed, in the OVS Order, the Commission recognized this potential threat to competition, and expressly did not "foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."[10]

If a competing MVPD is unable to provide consumers with popular programming, and especially exclusive sports or other local programming, consumers will stay with the cable operator who can offer the programming. Without access to popular programming, competing MVPDs will be driven out of business and the incumbent cable operators will continue to monopolize the video marketplace. Accordingly, now that the Commission has shut the door to abuses using satellite delivered programming, RCN urges the Commission to remain vigilant to this threat and to act promptly to stop any such anticompetitive actions should they occur.

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[9] OVS Order at ¶ 189, n. 435, citing 138 Cong. Rec. H6540 (daily ed. July 23, 1992) (statement of Rep. Eckart) (the cable industry knows "that if they maintain their stranglehold on this programming, they can shut down competition -- even the deep pockets of the telephone companies for a decade or more.").

[10] *Id.* at ¶ 197, n. 451.

B. Wiring Access

In response to the Cable Television Consumer Protection and Competition Act of 1992, the Commission established the demarcation point for cable inside wiring in MDUs "at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit."[11/] As RCN indicated in its Comments on cable inside wiring, this demarcation point is often inaccessible, embedded inside the buildings' walls.[12/] As a result of this demarcation point, in order to access subscribers, competing MVPDs would need to run a second wire into each apartment, thereby disrupting both the subscriber's premises and the hallways of the MDU. This disruption causes many MDU owners to often be unwilling to grant competing MVPDs access to their buildings to run a second wire. Therefore, under the Commission's existing inside wiring rules, there is a significant barrier to competing MVPDs' ability to offer their services.

In its Inside Wiring Comments, RCN supported requests that the Commission set the demarcation point at that point where the common line meets the dedicated line.[13/] To date, the Commission has not issued an Order in that proceeding. RCN urges the Commission to resolve promptly the cable inside wiring issue and to move the demarcation point to a point where it is readily available to all

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[11/] 47 C.F.R. § 76.5(mm) (1995).

[12/] Comments of RCN, CS Docket No, 95-184 (filed Mar. 19, 1996); Reply Comments of RCN, CS Docket No. 95-184 (filed Apr. 17, 1996) (collectively "Inside Wiring Comments").

[13/] *Id.*

video service providers so as to eliminate this critical impediment to competition.

C. Pricing

The 1996 Act permits cable operators to offer bulk discounts to MDUs.[14] The Commission has stated that this provision "does not permit a cable operator to offer discounted rates on an individual basis to subscribers simply because they are residents of a multiple dwelling unit, but rather requires a 'bulk discount[],' ... that is negotiated by the property owner or manager on behalf of all of the tenants."[15] Despite this prohibition, incumbent cable operators continue to offer discounts to selected MDU residents as opposed to the entire building. These anticompetitive practices are directed toward residents that either are negotiating with RCN or have recently subscribed to RCN's video services.

The incumbent cable operators' unlawful and anticompetitive pricing actions are harmful to RCN and other competing MVPDs. RCN's lower price is one of its most important methods for attracting subscribers.[16] The incumbent cable operators restrict

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[14] 47 U.S.C. § 623(d) (1996).

[15] In the Matter of Implementation of Cable Reform Act Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking, CS Docket No. 96-85, released April 9, 1996.

[16] RCN offers its basic service, which consists of 59 channels, to MDUs at a bulk rate of $15.00 per apartment, regardless of the number of television sets in that apartment. RCN's competitors typically charge twice as much -- approximately $27.00 (continued...)

RCN's ability to compete when the cable operators lower their rates only for those MDU residents that are subscribers of, or are negotiating with, RCN

III. Conclusion.

Congress intended for the 1996 Act to create a competitive marketplace in which consumers will have a multitude of choices from which to receive video service. Although the 1996 Act creates numerous potential sources of competition, competition currently does not yet exist in the video marketplace. A competitive marketplace will not develop by itself. The Commission must continue to play an active role in fostering competition by implementing regulations that will allow MVPDs to compete effectively with the incumbent cable operators.

Respectfully submitted,

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[16] (...continued)
to $38.00 per apartment, plus an additional charge if a subscriber has more than one television set -- for similar services.